Supreme Court, U.S.
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No. 82-773

In the Supreme Court of the United States

October Term, 1982

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a CITY UTILITIES, and CITY OF SPRINGFIELD, MISSOURI,
Petitioners,

vs.

BILL'S COAL COMPANY, INC. and WILLIAM D. PATCH, SAVANNA LEE PATCH, LLOYD F. BURKDOLL, ANNA FAYE BURKDOLL, JOHN E. BURKDOLL and VIRGINIA L. BURKDOLL, all the general partners of and d/b/a CHEROKEE COAL COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAUL SCOTT KELLY, JR.
(Counsel of Record)
GEORGE P. COUGHLIN
2345 Grand Avenue
P. O. Box 23428
Kansas City, Missouri 64141
(816) 474-6460
Counsel for Respondents

(Of Counsel on Inside Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether This Court Should Accept for Certiorari Review the Court of Appeals' Interlocutory Ruling That the Coal Company Did Not Breach or Repudiate the Contract Under Missouri Law.

2. Whether the Court of Appeals Clearly Erred in Its Application of Missouri Contract Law or Clearly Abused Its Equitable Discretion in Reinstating and Continuing Preliminary Injunctive Relief.

The caption of the case contains the identity of all interested parties. Respondents mailed and filed with this Court on November 19, 1982, a listing of corporate ownership pursuant to Supreme Court Rule 28.1. That statement is still accurate.

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STATEMENT OF THE CASE

Nature of the Case

This diversity litigation involves three consolidated cases between petitioners and respondents. The cases, which are now awaiting final judgment, are pending in the United States District Court for the Northern District

of Oklahoma (the "District Court"). The actions all involve a Missouri coal contract governed by the Missouri Uniform Commercial Code. The contracting parties are before this Court by virtue of an interlocutory ruling of the United States Court of Appeals for the Tenth Circuit (the "Court of Appeals"). On July 6, 1982, the Court of Appeals continued a preliminary injunction which the District Court had dissolved on January 29, 1982. That dissolution was based solely on a legal determination that the coal contract had been breached and repudiated by respondents according to Missouri law. The petitioners, the City of Springfield, Missouri and the Board of Public Utilities of Springfield, Missouri, d/b/a City Utilities ("the Utility"), seek to overturn the interlocutory ruling on Missouri state law made by the Court of Appeals.

Statement of Facts*

The contract in dispute (referred to in the litigation as the "1979 Amendment") is a five-year coal supply agreement. (App. D, at A17-18). It was negotiated and executed in April of 1979. (App. D, at A23-24). Respondents Bill's Coal Company, Inc. and its six individual owners, who are the concurrent general partners of Cherokee Coal Company (the "Coal Company"), are the seller and coal supplier under the contract. (App. A, at A3). The Utility is the coal buyer. (*Id.*). The Coal Company is obligated to sell and the Utility is obligated to buy up to 605,000 tons of coal during each fiscal year (April 1 to March 31) that the contract is in effect. (Petition, at 3-4; App. A, at A3).

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*The Statement of Facts and Course of Proceedings are taken from the District Court's Phase I (Appendix D) and Phase II (Appendix E) opinions and the majority opinion of the Court of Appeals. (Appendix A). These Appendices, which are a part of the Utility's petition, are hereinafter referenced as "App. ....."

Numbered paragraph 5 of the contract provides that the Coal Company must notify the Utility before January 1 of the price it will charge for coal during the succeeding fiscal year. (App. A, at A4; App. D, at A30-31). After that notification, the Utility has until the end of March to solicit bids from other coal suppliers. (*Id.*). If a qualified alternative supplier is able to meet the contract specifications and submits a bid price to supply coal to the Utility at least 25% under the Coal Company's quoted price for the upcoming fiscal year, the Utility can immediately terminate the contract with the Coal Company effective March 31. (*Id.*) This unilateral termination or "take-out" clause can only be invoked by the Utility. (*Id.*). It requires no act or performance on the part of the Coal Company, except the tender of the Coal Company's quoted price. (*Id.*).

According to the contract, the Coal Company is to quote its new fiscal price "f.o.b." its Garland, Kansas mine. (*Id.*). The Utility then pays for transporting the coal to its power plants around Springfield, Missouri. (*Id.*). The contract interpretation dispute which resulted in the dissolution of injunctive relief and a reinstatement of the same by the Court of Appeals arose with regard to the meaning of the 25% price comparison language in the termination clause. (App. A, at A3; App. D, at A24). The contract language provides that the 25% provision is satisfied if the Utility accepts a bid from a qualified coal producer "at a *delivered price* of at least 25% less than the *price quoted* by [the Coal Company]." (App. D, at A30) (emphasis added).

On December 28, 1979, representatives of the Coal Company delivered a letter to the Utility containing the Coal Company's quoted f.o.b. mine price for fiscal year 1980.

(App. D, at A34; App. E, at A52). During a meeting that same day, general counsel for the Coal Company stated to the Utility's general manager that the language of the termination clause provided that the Utility could not terminate the contract unless a competitor's bid price, together with the expected freight cost for delivery of coal to the Utility, was at least 25% less than the f.o.b. mine price quoted in the Coal Company's letter ("delivered price versus f.o.b."). (*Id.*).[1] The Utility's general manager rejected that interpretation statement, claiming that the intended interpretation was to compare a bidder's price without freight to the Coal Company's quoted price without freight ("f.o.b. versus f.o.b."). (App. A, at A4-5; App. D, at A34-36). Coal shipments to the Utility for the balance (January to March) of fiscal year 1979 continued.

The Utility proceeded to solicit coal bids from alternative suppliers. (App. A, at A5; App. E, at A52-53). After receiving coal bids and making its "f.o.b. versus f.o.b." price comparison, the Utility claimed that the bids it received enabled it to immediately terminate the contract with the Coal Company under the 25% price comparison.[2] (App. E, at A53, A60). The Utility exercised that right and terminated the contract by its notice of March 27, 1980. (*Id.*). As a result of that termination, all coal shipments by the Coal Company to the Utility ceased.

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1. The Coal Company's general counsel and the Utility's general manager both participated in the negotiation of the contract in April of 1979. (App. D, at A22, A33-34).

2. In its termination notice, the Utility relied on the 25% provision and alternatively upon the 15% (one year hence) provision. The price comparison language is the same under both. Because the agreement was immediately terminated (25%) and the District Court concluded that both provisions could not be invoked simultaneously, the 15% provision has never been at issue. (*See* App. D, at A30, A39).

Course of Proceedings

Apparently unsure of its position, the Utility brought a declaratory judgment action against the Coal Company at the same time it terminated the contract and refused to accept any more coal from the Coal Company. (App. A, at A5). The declaratory action sought a ruling of non-liability by the Utility for its termination. (*Id.*; App. E, at A53). In response, the Coal Company immediately filed its own suit claiming the Utility had breached and repudiated the contract by its wrongful termination of March 27, 1980. (App. E, at A53). In addition, the Coal Company moved for a preliminary injunction to require the Utility to perform the agreement pending the litigation. (*Id.*). After an evidentiary hearing and with the consent of the Utility, the preliminary injunction was issued by the District Court on April 18, 1980. (*Id.*). Coal shipments by the Coal Company resumed. Thereafter, the Utility amended its pleadings to affirmatively assert antitrust and breach of warranty (based on coal quality) claims against the Coal Company. (App. A, at A5; App. E, at A70-71). Both cases were consolidated for all purposes (hereinafter the "1980 case"). (App. A, at A5; App. E, at A54).

During the first months of 1981, the Utility again solicited bids from alternative coal suppliers. In March of 1981, the Utility again terminated the contract in reliance upon the 25% provision of the termination clause. Coal shipments by the Coal Company were refused. In response, the Coal Company instituted in the District Court another breach of contract action against the Utility and moved for a preliminary injunction to require the Utility to perform the contract pending the litigation (hereinafter the "1981 case"). Following an extended evidentiary hearing, the requested preliminary injunction was issued on April 9, 1981. Coal shipments by the Coal Company re-

sumed. Trial of the 1981 case was held in abeyance pending the outcome of the 1980 case.

In the early stages of the litigation, both parties contended that the termination clause was not ambiguous and that it should be interpreted on its face. (App. A, at A4). However, the parties urged different interpretations. The Utility claimed that the termination language provided for an "f.o.b. versus f.o.b." price comparison. (App. D, at A34, A36). The Coal Company asserted, as it had on December 28, 1979, that the unambiguous language required a "delivered price versus f.o.b." comparison. (*Id.*). Nevertheless, the parties agreed that the 1979 Amendment was a Missouri contract governed by Missouri law, including the Missouri Uniform Commercial Code (the "Missouri Code"). (Petition, at 13; App. D, at A24).

At the final pretrial stage of the 1980 case, the parties agreed to waive a jury and to try the case in there phases: Phase I to interpret the contract; Phase II to determine whether either party was in breach; and Phase III to determine any damages and relief due. (App. A, at A5; App. D, at A18). At the same time, the Coal Company amended its allegations to assert that the termination clause was ambiguous and that the subjective intent of the parties was to compare the Coal Company's quoted f.o.b. price plus freight to the bidder's f.o.b. price plus freight ("delivered price versus delivered price"). (Petition, at 7; App. D, at A31). The Utility continued to argue that the clause was not ambiguous. Its interpretation position also remained the same ("f.o.b. versus f.o.b.").

During the trial of Phase I, extensive parol testimony was permitted. (App. D, at A18-35). The witnesses for the Coal Company testified that they believed the contracting parties intended the comparison to be "delivered price

versus delivered price." (App. D, at A32-33). The Utility's witnesses said they believed the comparison the parties intended was "f.o.b. versus f.o.b." (App. D, at A34). The parties also testified about their meeting on December 28, 1979. (*Id.*). After the Phase I trial, the District Court concluded that the clause was ambiguous. (App. D, at A35). It then found that the comparison under the termination clause was "intended to be a reciprocal delivered price comparison" or "delivered price versus delivered price." (App. D, at A37). The interpretation urged by the Utility was rejected. (App. D, at A35-37). Although the District Court did not adopt the Coal Company's literal interpretation of "delivered price versus f.o.b.," the Phase I opinion noted that such an interpretation was "plausible." (App. D, at A35-36).

Based on its conclusions and findings in Phase I, the District Court ruled that the Utility had wrongfully terminated the contract by its notice of March 27, 1980. (App. A, at A6). However, the Utility was granted leave to amend its pleadings after the Phase I trial to claim that the Coal Company had breached and anticipatorily repudiated the contract on December 28, 1979 by asserting a literal contract interpretation ("delivered price versus f.o.b.") that was different from the subjective interpretation ("delivered price versus delivered price") asserted by the Coal Company during the trial of Phase I. (App. A, at A5; App. D, at A40).

After Phase II, the District Court ruled in favor of the Utility on its amended claim of breach and repudiation. (App E, at A74). It concluded that the Coal Company had committed a "bad faith" breach under Section 400.1-203 and had also anticipatorily repudiated the contract under Section 400.2-610 of the Missouri Code by asserting on December 28, 1979, an interpretation of the termination

clause which was different from what the Coal Company believed the clause to mean based on the parties' subjective intent. (App. E, at A62-67). Based on that conclusion, the District Court dissolved injunctive relief in both the 1980 case and the 1981 case. (App. E, at A74; App. F).

The Coal Company immediately appealed the dissolution ruling to the Court of Appeals pursuant to 28 U.S.C.A. § 1292(a)(1) (West 1966). (App. A, at A3). After briefing by the parties, injunctive relief was reinstated pending the appeal. (*Id.*). Following full briefing and oral argument, the Court of Appeals decided on July 6, 1982, that the Coal Company did not breach or repudiate the agreement. (App. A, at A7). The Court of Appeals found that "the trial court had erred in its application of the law on the only issue found against [the Coal Company] in Phase II of the trial"; accordingly, the Court of Appeals ordered that the injunctive relief it reinstated on April 22, 1982 "should be continued in effect." (App. A, at A8).

On August 9, 1982, the Utility's petition for rehearing or for rehearing en banc was denied. (App. C). The litigation was remanded to the District Court and the appellate mandate was issued. The District Court proceeded with the processing of Phase III. During the trial of Phase III, the Utility filed with this Court its petition for a writ of certiorari to the Court of Appeals.[3] Phase III has been completed and the parties are now awaiting the District Court's supplemental Phase II opinion and its findings of fact and conclusions of law on Phase III. Final judgment should follow the entry of those opinions.

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3. The Utility seeks to invoke this Court's certiorari jurisdiction under 28 U.S.C.A. § 1254(1) (West 1966). (Petition, at 2). However, at the time the Utility's petition was filed with this Court the litigation between the parties was "*in*" the *District Court*. 28 U.S.C.A. § 1254 (West 1966) (emphasis added).

SUMMARY OF ARGUMENT

The Utility's petition seeks review by this Court of an interlocutory ruling by the Court of Appeals that the Coal Company did not breach or repudiate the contract under Missouri state law. Review of that ruling should be denied because the petition does not come within the criteria of Supreme Court Rule 17, and this Court has traditionally refused to review state law questions. Review should further be denied because the petition is not ripe and it raises no substantial question that is important or suitable to general application. Finally, the Utility has wholly failed to show that the Court of Appeals clearly erred in its application of Missouri contract law or that it otherwise clearly abused its equitable discretion in reinstating and continuing injunctive relief.

ARGUMENT

I.

This Court Should Not Accept for Certiorari Review the Court of Appeals' Interlocutory Ruling That the Coal Company Did Not Breach or Repudiate the Contract Under Missouri Law

The petition before this Court involves the application of Missouri contract law. It is without dispute that the District Court dissolved injunctive relief based on its conclusion that, under Missouri law, the Coal Company's statement of contract interpretation on December 28, 1979 constituted a breach and anticipatory repudiation of the 1979 Amendment. The Court of Appeals held that the District Court erred in its application of Missouri contract law, thereby warranting the reinstatement and continuation of injunctive relief. Neither the District Court nor the Court of Appeals relied upon any federal statute, rule, right or constitutional provision in connection with their rulings and the Utility did not raise any federal issue.[4] Accordingly, the first question presented to this Court is whether certiorari should properly be granted to review the Court of Appeals' application of Missouri contract law.

The Utility's petition makes no reference to Rule 17 of this Court. That is understandable since the petition does not come within any of the three categories of Rule 17. Those categories indicate the criteria generally considered by this Court in measuring the exercise of certiorari review. In addition, the Utility has not shown that the Missouri contract law issue it seeks this Court to review is "special and important." Rule 17(1), Sup. Ct. R. (1980).

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4. To the extent that the Utility is attempting to *now* create and raise some federal issue before this Court, it should not be permitted. *See, e.g., Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975).

This Court has a long tradition of declining review of state law questions. *See, e.g., Butner v. United States,* 440 U.S. 48, 58 (1979); *Pierson v. Ray,* 386 U.S. 547, 558 n.12 (1967); *Wolf v. Weinstein,* 372 U.S. 633, 636 (1963). The Utility has presented no compelling or important reason for this Court to depart from that precedent in the circumstances of this litigation. Moreover, the breach of contract argument asserted by the Utility in the lower courts and in its petition before this Court not only lacks support in Missouri law, but it finds no support in the contract law of any other state.

The decision by the Court of Appeals on Missouri contract law could in no way be characterized as a ruling that is in conflict with the highest state court (Supreme Court) in Missouri. In addition, the Court of Appeals' ruling is not in conflict with Missouri's intermediate appellate courts, nor is it in conflict with Missouri law as established by the United States Court of Appeals for the Eighth Circuit and the federal district courts sitting in Missouri. Furthermore, the ruling is not in conflict with the decisions of other federal and state courts. The contract law question decided by the Court of Appeals is not only consistent with Missouri law, but it is in accordance with other state and federal decisions that have reviewed a similar question of contract law.

In addition to the above, there are pragmatic reasons which support the refusal to grant certiorari. First, the ruling sought to be reviewed is interlocutory in nature and there has not been a final judgment entered in the litigation between the parties. Thus, even if this was a circumstance that might be appropriate for certiorari review, it is not ripe for such a review. *Cf. Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.,* 389 U.S. 327, 328 (1968); *Hamilton-*

Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-58 (1916). Second, the Court of Appeals only considered one of the three arguments raised by tne Coal Company. The other two arguments are equally meritorious. Third, the petition presents no issue which is likely to occur elsewhere or which will have an impact on a great number of litigants. The legal question sought to be reviewed is purely one of Missouri state contract law under a unilateral termination clause setting. Any decision on the merits that might be rendered by this Court under the facts presented would have very limited application in any other circumstance.

The Utility's petition is wholly inappropriate for discretionary review by this Court under its certiorari jurisdiction.

II.

The Court of Appeals Did Not Clearly Err in Its Application of Missouri Contract Law, Nor Did the Court of Appeals Clearly Abuse Its Equitable Discretion in Reinstating and Continuing Preliminary Injunctive Relief

In its amended pleadings in the District Court, the Utility claimed that the statement of contract interpretation made by the Coal Company on December 28, 1979 was both a "bad faith" breach of the contract under Section 400.1-203,[5] *and* an anticipatory repudiation of the agreement under Section 400.2-610 of the Missouri Code. The District Court concluded in Phase II that the legal "position" taken by the Coal Company on December 28, 1979

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5. That Missouri Code Section provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Section 400.2-103(1)(b) of the Missouri Code then provides that "'good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

was a "bad faith" breach of the contract because the interpretation urged was contrary to the Coal Company's belief as to the subjective intent of the parties. (App. A, at A6; App. E, at A65-67). The District Court had earlier found in Phase I that the "delivered price versus f.o.b." interpretation urged by the Coal Company was "plausible," and that the Utility had wrongfully exercised the termination clause based on its own erroneous interpretation on March 27, 1980. (App. A, at A6; App. D, at A35-36). The District Court also concluded in Phase II that the Coal Company's interpretation statement of December 28, 1979 was an anticipatory repudiation under Section 400.2-610 because it manifested an intention by the Coal Company not to abide by the terms of the contract. (App. A, at A6; App. E, at A64). Based on those legal determinations, the District Court concluded that the Utility would be entitled to the Missouri Code remedy of cancellation. (App. A, at A6). Therefore, the court granted the Utility's motion to dissolve all injunctive relief. (*Id.*).

On appeal, the Coal Company raised three objections to the conclusions in support of the dissolution ruling. (*Id.*). First, it argued that Missouri courts have not and would not recognize a right of action based on a contracting party's failure to comply with the Missouri Code's good faith obligation under these facts. (*Id.*). Secondly, the Coal Company asserted error in the "bad faith" determination since the District Court had found in Phase I that the Coal Company's interpretation statement of December 28, 1979 was "plausible." (App. A, at A6-7; App. D, at A35-36).[6] In its third assignment of error the Coal

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6. That interpretation was based on the Coal Company's reading of the literal contract language in conjunction with the legal advice of the Coal Company's general counsel that the termination clause was not ambiguous. *See Willman v. Beheler*, 499 S.W.2d 770, 774-75 (Mo. 1973). The Utility has consistently asserted that the clause is not ambiguous.

Company argued that, even if it had allegedly acted in "bad faith" and even if Missouri courts would generally recognize such a statement of contract interpretation as a breach or repudiation, when the alleged "bad faith" was limited to espousing an interpretation of the circumstances under which the Utility could properly exercise the termination clause and the statement did not otherwise interfere with the performance of either party under the contract, the conduct could not and did not give the Utility a right to cancel the contract. (App. A, at A7).

The Court of Appeals did not address the first two arguments made by the Coal Company. (*Id.*). Instead, the court agreed that the Coal Company's conduct, however characterized, could not be regarded as a contract breach or repudiation. (*Id.*). The Court of Appeals found that "[i]n urging an interpretation of the termination clause it knew did not reflect the parties' intent, [the Coal Company] did not affect either party's performance under the contract." (*Id.*). The opinion emphasized that an assumed bad faith assertion ". . . of a particular interpretation of a termination clause is neither a failure to perform contract obligations (breach) nor an indication that those obligations will not be performed in the future (repudiation)." (*Id.*).

In its petition, the Utility again fails to identify any performance by the Coal Company under the unilateral termination clause which the Coal Company could have breached or repudiated. The only performance requirement by the Coal Company under the clause is to tender its new fiscal price, which it did. Without some connection between the interpretation statement of December 28, 1979 and a failed performance by the Coal Company under the termination clause, there is no rational basis for a breach or repudiation. Any conclusion to the contrary would emas-

culate the fundamental principles of Missouri and all other contract laws.

In an attempt to create such a connection, the Utility again argues that the interpretation statement by the Coal Company allegedly deprived the Utility of its rights under the termination clause or prevented, hindered or frustrated the contract as a whole. (Petition, at 8, 11, 13). This argument is ludicrous. It is undisputed that the Utility knowingly and voluntarily *exercised* its unilateral termination right under the contract on March 27, 1980, three months after it wholly rejected the Coal Company's interpretation statement. That termination was subsequently found to be *wrongful* by the District Court.[7] The Coal Company was powerless to prevent that wrongful action before it occurred. The Utility alone had the right and power to act and did so; the Coal Company could only react. For the Utility to even insinuate that it could not and did not terminate the contract is a gross misstatement of the undisputed and determined facts.[8]

The Utility cites three Missouri and five non-Missouri cases to support its claim of error by the Court of Appeals.

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7. One of the reasons it was held wrongful was that the "f.o.b. versus f.o.b." interpretation affirmatively enforced by the Utility in its termination of March 27, 1980 was erroneous. The Utility has consistently asserted that its "f.o.b. versus f.o.b." interpretation is the *only* one intended by the parties and required by the literal language of the termination clause.

8. The Utility implies that the Coal Company breached and repudiated the contract by refusing to honor and accept the utility's wrongful termination of March 27, 1980. Adoption of such a legal argument would be contrary to Missouri public policy. *See, e.g., Cameron, Joyce & Co. v. State Highway Commission*, 166 S.W.2d 458, 461 (Mo. 1942). In essence, the Utility argues that a contracting party has no right to voice an opinion on the rights of another contracting party under a termination clause that can only be exercised by the latter. Neither Missouri nor any other state has adopted such a unique and dangerous proposition of contract law.

(Petition, at 11-18). All eight case references fail the Utility. Not one of the cases cited in the petition involved a termination clause or a contract setting that resembles the circumstance presented in this litigation. More importantly, none of the opinions cited depart from the basic contract principle, relied upon by the Court of Appeals, that a breach or repudiation of a contract must be grounded on an affirmative injurious act of failed contract performance. *See* Mo. Rev. Stat. §§ 400.2-601 to 608; 400.2-610; 400.2-612 (1978); *Restatement (Second) of Contracts* §§ 235, 241, 243, 245, 250 (1981); *Missouri Public Service Co. v. Peabody Coal Co.*, 583 S.W.2d 721; 725 (Mo. App.), *cert. denied*, 444 U.S. 865 (1979); *Cardinal Stone Co., Inc. v. Rival Mfg. Co.*, 669 F.2d 395 (6th Cir. 1982); *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 138 (5th Cir.), *cert. denied*, 444 U.S. 938 (1979); *Chandler v. Hunter*, 340 S.W.2d 818, 821 (Ala. App. 1976). No such act or performance has ever been alleged, identified or proven by the Utility.

In its petition, the Utility further argues that ". . . the Court of Appeals' decision fails to recognize that the Coal Company's bad faith fraudulent conduct has a direct bearing upon its right to equitable injunctive relief." (Petition, at 11). In an attempt to support this reckless argument, the Utility fabricates accusations of "fraud" and "false affidavits, false testimony under oath, false answers to interrogatories, false pleadings, etc." (*Id.*). This desperate argument on the part of the Utility is wholly unsupported by the record.

The Utility urged the District Court on several occasions to dissolve injunctive relief because of the alleged "bad faith" or unclean hands of the Coal Company. The Utility vigorously urged the Court of Appeals to deny injunctive relief for the same reason. Neither the District

Court nor the Court of Appeals accepted that argument. Both lower courts had ample opportunity to deny injunctive relief on equitable grounds, but they declined to do so. Notwithstanding the Utility's characterization of the Coal Company's conduct, the Court of Appeals mandated that injunctive relief be continued. Thus, there was no "failure" on the part of the Court of Appeals to "recognize" the Coal Company's conduct when it reinstated and continued injunctive relief.

The Utility's reckless insinuation of "fraud," "false" testimony and "false" court papers is very disturbing to the Coal Company. Neither the District Court nor the Court of Appeals have ever characterized the conduct or papers of the Coal Company or its counsel as the Utility seeks to do. The character of advocacy exhibited in the Utility's petition before this High Court lends no respect to either the Utility or the record in the lower courts.

The Utility appears to be asking this Court to review the exercise by the Court of Appeals of its discretionary equitable powers. Such a review is not proper or warranted for several reasons. First, equitable review is narrow. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Second, the granting of an injunction is discretionary and will not be reviewed or overturned absent a clear showing of an abuse of that discretion. *Brown v. Chote*, 411 U.S. 452, 457 (1973); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*, 363 U.S. 528, 535 (1960). And third, injunctive relief will not be undone lightly and only under a clear satisfaction of several standards. *United States v. Swift & Co.*, 286 U.S. 106, 119-21 (1932). The Utility has wholly failed to show, clearly or otherwise, that there is a compelling reason to review and find an abuse by the Court of Appeals of its discretionary equitable powers.

CONCLUSION

For all of the foregoing reasons, the Utility's petition for a writ of certiorari to the Court of Appeals should be denied and the Coal Company should be awarded such costs as deemed appropriate by this Court.

Respectfully submitted,

PAUL SCOTT KELLY, JR.
(Counsel of Record)
GEORGE P. COUGHLIN
2345 Grand Avenue
P. O. Box 23428
Kansas City, Missouri 64141
(816) 474-6460
Counsel for Respondents

Of Counsel:

GAGE & TUCKER
2345 Grand Avenue
P. O. Box 23428
Kansas City, Missouri 64141
(816) 474-6460

LOGAN, LOWRY, JOHNSTON,
SWITZER & WEST
101 South Wilson Street
P. O. Box 558
Vinita, Oklahoma 74301
(918) 256-7511